SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 838

NELLIE C. BOSTWICK, ET AL.,
Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOS. B. ADAMS,
Counsel for Petitioners.

INDEX

Subject Index

Table of Cases Cited

STATUTES AND AUTHORITIES CITED

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Nellie C. Bostwick, a citizen of Duval County, Florida, Jacksonville Heights Improvement Company, a Florida corporation with its principal place of business at Jacksonville, Florida; Emma F. McDermott, Francis J. McDermott, James L. McDermott, John W. McDermott, Joseph McDermott and Wilfred J. McDermott, heirs of P. F. McDermott, deceased, respectively petitioning show to the Court:

Summary Statement of Matters Involved

This is a condemnation suit for a Naval Air Field. Petitioners were owners of sundry parcels of land taken. The

Respondent Baldwin Drainage District was an adverse claimant for drainage taxes.

The Record presented herewith consists of two parts. The first part, referred to as Vol. I, was the transcript of record brought here with a former Petition for Certiorari that was denied May 3, 1944, 319 U. S. 742. The second part, referred to as Vol. II, was the supplemental transcript presented to the Fifth Circuit Court of Appeals in connection with a second appeal to that Court in the same case, plus the proceedings had on said second appeal in said Circuit Court of Appeals.

The First appeal and Petition for Certiorari involved parcels 4, 5, 15 and 24 (Vol. I, pp. 21, 23, 30 and 36), as to which the Drainage District claimed a fee title (Vol. I, p. 61) by virtue of certain Federal Drainage Tax Foreclosure Decrees entered against Duval Cattle Company and Jacksonville Heights Improvement Company some 10 or 12 years before the takings in this suit. The District Court held (Vol. I, p. 276-282) that the Answers of the land-owners on the first appeal were incompetent collateral attacks on the former Federal Decrees and that said Decrees were res judicata. The Court of Appeals affirmed and this Court denied Certiorari (319 U. S. 742).

The Second appeal involved the non-decree lands, that is to say parcels against which the Drainage District had never obtained any decree foreclosing drainage taxes. The Petitioner Nellie C. Bostwick was conceded to be the owner of 520 acres described in the Government's Petition as Parcel 23 (Vol. I, 35-36) and claimed by her (Vol. I, pp. 83-84). The Petitioning heirs of P. F. McDermott were conceded to be the owners of Parcel 28 (Vol. I, p. 40) described in the Government's Petition and claimed by said heirs (Vol. I, pp. 86-87). The Petitioner Jacksonville Heights Improvement Company was conceded to be the owner of Parcels 14, 21, 22, 25, 36, and 37 described in the

Government's Petition (Vol. I, pp. 29, 34, 35, 38, and 45) and those parcels were claimed by that company (Vol. I, p. 84). The location of the McDermott Parcel 28, and the location of the parcels belonging to Jacksonville Heights Improvement Company can be identified on the map (Vol. I, p. 231).

The Respondent Baldwin Drainage District by Answer (Vol. I, p. 61 to 72) claimed drainage taxes against said parcels severally alleging to have accrued from the date of the taking back to various dates such as 1926, 1919 and the like, and the amounts, so claimed, far exceeded in most cases the amounts of the awards made by the Federal Jury (Vol. I, p. 273).

The Original Answer of Petitioners (Vol. I, p. 79 et sequi) attacked the validity of the drainage taxes claimed against the non-decree lands on sundry grounds.

A Suit in Equity was then pending in the State Court against the Drainage District involving other lands in the Western part of the District. In that suit similar attacks had been made on the validity of the drainage taxes. On account of the pendency of that suit the District Court made an Order, July 16, 1942 (Vol. I, pp. 274-275), deferring action as to the non-decree lands until the State case was disposed of. The Supreme Court of Florida rendered an adverse decision in that case on April 4, 1944, reported as *Baldwin Drainage District* v. *Macclenny Turpentine Company,* 18 So. 2d 792. Certiorari was applied for in this Court and denied January 15, 1945 (89 L. Ed. (Adv.) 415). It was contended, by Brief for Respondent in that case, that the Petitioners in that case had not by their Pleadings in the State Court properly presented any Federal question and that the State Supreme Court had not decided any Federal question. The denial of Certiorari apparently agreed with those contentions. Four days

afterwards, to-wit: January 19, 1945, the Petitioners, now before this Court, filed an Amended Answer (Vol. II, p. 33) in this and three other condemnation suits for the specific purpose of meeting the Federal question deficiencies claimed to have existed in the State Court record.

Prior to all those proceedings the Drainage District had filed on May 16, 1942, its Motion to Strike the Original Answer (Vol. I, p. 257) of these Petitioners. That Motion became applicable to the Amended Answer. On October 12, 1944 the Drainage District filed an Application for Distribution of the Awards (Vol. II, p. 13). On the same date these Petitioners filed a Motion (Vol. II, p. 6 to 12) for trial on the adverse claims. In that Motion the Petitioners set out sundry reasons why the decision of the Supreme Court of Florida in the *Macclenny Turpentine Company* case should not be controlling in determining the adverse claims in these Federal Condemnation suits. With those several Motions pending the District Court made an Order on January 24, 1945 (Vol. II, pp. 45-46) holding that in the light of the decision of the Supreme Court of Florida in *Baldwin Drainage District* v. *Macclenny Turpentine Company,* 18 So. 2d 792, the original Answer and Amended Answer of these Petitioners:

> "To be without merit as to all of the lands involved in this suit not heretofore included in any Federal Drainage Tax Foreclosure Decree."

Thereupon the said Order directed:

> "That all parts of the aforesaid original Answer not heretofore stricken and said Amended Answer are hereby stricken and held for naught as applied to all 'non-decree lands' which at the time of taking were claimed severally by said Defendants."

On the same date the District Court made an Order of Distribution (Vol. II, p. 47) giving to the Drainage District all of the award for Parcel 23, except what had been paid for

State and County taxes, and giving to the Drainage District nearly all of the award for Parcel 28 theretofore belonging to the McDermott Heirs, and giving to the Drainage District nearly all of the award for the parcels theretofore belonging to Jacksonville Heights Improvement Company.

On Appeal the Fifth Circuit Court of Appeals affirmed the Orders of the District Court, see Opinion (Vol. II, pp. 66 to 69). The primary basis of the affirming Opinion is found in the following language (Vol. II, p. 68):

> "Our course here has been charted by the Supreme Court of Florida and we must follow it."

The Court then cited, as controlling, *Baldwin Drainage District* v. *Macclenny Turpentine Company,* 18 So. 2d 792. The Petitioners here by their Petition for Rehearing filed December 18, 1945 (Vol. II, p. 71), endeavored to point out to the Court of Appeals what they believed to be the fundamental errors of the Court of Appeals and of the District Court. Nevertheless that Petition was denied January 7, 1946. Hence this Petition for Writ of Certiorari.

Basis of Jurisdiction

The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, now 28 U. S. C. A., Sec. 347(a). The decree and judgment of the Circuit Court of Appeals for the Fifth Circuit was filed November 29, 1945 (Vol. II, p. 70). Petition for Rehearing was filed December 15, 1945 (Vol. II, p. 71). The Petition for Rehearing was denied January 7, 1946 (Vol. II, p. 81). Application for Stay Order was filed January 11, 1946 (Vol. II, p. 82), and an Order was made January 15, 1946 (Vol. II, p. 84) staying the Mandate of the Court in this and companion cases for a period of thirty days to permit filing of a Petition for Certiorari with accompanying record and if so filed until final dis-

position of the case by this Court. This Petition is being filed within the thirty days so allowed by said Order and within three months after date of said Opinion and Judgment and within much less than three months after Petition for Rehearing was denied. The opinion and judgment of said District Court of January 24, 1945 (Vol. II, p. 45 and 47) and the Opinion and Judgment of said Circuit Court of Appeals for the Fifth Circuit (Vol. II, pp. 66 and 70) had such finality as to warrant the issuance of Writ of Certiorari pursuant to this Petition.

Questions Presented

Upon the record and upon the opinion and judgment of the Circuit Court of Appeals for the Fifth Circuit as above explained the following important Federal questions are presented:

I

WHEN THE DISTRICT AND THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT WERE EXERCISING THEIR JURISDICTION IN A NON-DIVERSITY OF CITIZENSHIP CASE, PURSUANT TO 40 U. S. C. A., SECTION 258 (A), TO DETERMINE WHAT WAS "JUST AND EQUITABLE" BETWEEN THE PETITIONERS AND THE DRAINAGE DISTRICT AS ADVERSE CLAIMANTS, WERE SAID LOWER COURTS BOUND BY THE DOCTRINE OF ERIE R. CO. v. TOMPKINS AND HENCE CONTROLLED BY THE DECISION OF THE SUPREME COURT OF FLORIDA IN BALDWIN DRAINAGE DISTRICT v. MACCLENNY TURPENTINE COMPANY, 18 SO. 2D 792, ON A NON-FEDERAL QUESTION OF ACQUIESCENCE WHEN APPLIED TO OTHER PARTIES, OTHER LANDS AND OTHER FACTS?

The District Court and the Court of Appeals both answered this question in the affirmative. The petitioners believe that in so doing the decisions of said lower courts are in conflict with the decision of this Court in the case of *U. S.* v. *Miller,* 317 U. S. 369, 382, and in conflict with decision of the Second Circuit Court of Appeals in the case of *U. S.* v. *Certain Lands,* 129 F. (2d) 577. See fourth head-note and supporting text.

II

DOES THE RULE OF ERIE R. CO. v. TOMPKINS LEAVE UNDISTURBED QUESTIONS CONCERNING WHETHER THE PETITIONERS BY THE OPERATION OR APPLICATION OF THE FLORIDA DRAINAGE LAW HAVE BEEN DEPRIVED OF THEIR PROPERTIES WITHOUT DUE PROCESS OF LAW CONTRARY TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

This question was, by the Petition for Rehearing (Vol. II, p. 74), submitted to the Court of Appeals but without avail. We shall point out, by supporting brief, that the Amended Answer of the Petitioners (Vol. II, pp. 36, 38 and 42) properly and sufficiently presented such Federal questions and that such Federal questions had not been adequately presented to nor passed upon by the State Supreme Court. In any event petitioners contend that the District Court and the Court of Appeals had an independent responsibility under 40 U. S. C. A., Section 258(a) to pass upon and determine such Federal questions irrespective of what the Supreme Court of Florida said or did not say in the case of *Baldwin Drainage District* v. *Macclenny Turpentine Company*, 18 So. 2d 792. See 54 Am. Jur., Subject "United States Courts", Section 352, page 974 and cases cited in note 6.

III

DO FEDERAL COURTS WHEN APPLYING AND DETERMINING RIGHTS UNDER 40 U. S. C. A., SECTION 258 (A), OR UNDER THE NATIONAL BANKING ACT OR UNDER THE BANKRUPTCY ACT OR UNDER ANALOGOUS FEDERAL STATUTES, OR WHEN DECIDING QUESTIONS BASED ON THE FOURTEENTH AMENDMENT, APPLY THEIR OWN "FAMILIAR EQUITABLE DOCTRINES" WITH RESPECT TO LACHES, ACQUIESCENCE OR ESTOPPEL, WITHOUT BEING BOUND BY THE RULE OF ERIE R. CO. v. TOMPKINS WITH RESPECT TO STATE DECISIONS?

The Courts below, in effect, answered this question in the negative. By supporting brief we shall point out that such decisions by the lower courts in this case are in apparent conflict with decisions of this Court and with decisions of other Courts of Appeal. See for example: *Ketchum* v.

Duncan, 96 U. S. 659, 24 L. Ed. 868, 4th headnote; *O'Brien* v. *Wheelock*, 184 U. S. 450, 46 L. Ed. 636, 3rd and 4th headnotes; *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 90 L. Ed. (Adv.) 88, 2nd and 7th headnotes.

IV

IF THE LAST CLAUSE OF 40 U. S. C. A., SECTION 258 (A) VESTS IN FEDERAL COURTS AN INDEPENDENT RESPONSIBILITY TO DETERMINE WHAT IS "JUST AND EQUITABLE" BETWEEN ADVERSE CLAIMANTS, THEN WAS IT "JUST AND EQUITABLE" OR CONSISTENT WITH DUE PROCESS OF LAW, GUARANTEED BY THE FOURTEENTH AMENDMENT, TO STRIKE ALL OF THE ANSWERS OF PETITIONERS AND DISTRIBUTE PRACTICALLY ALL OF THE AWARDS FOR PETITIONERS LANDS TO THE DRAINAGE DISTRICT FOR ALLEGED DRAINAGE TAXES WHEN SOME TWO YEARS AFTER THE ASSESSMENT AND CONFIRMATION OF BENEFITS THE DRAINAGE DISTRICT CHANGED ITS PLAN OF RECLAMATION AND COMPLETELY ABANDONED ALL PROPOSED DRAINAGE IMPROVEMENTS WHICH MIGHT HAVE BEEN OF BENEFIT TO PETITIONERS LANDS OR WHICH MIGHT HAVE CONSTITUTED A CONSIDERATION TO PETITIONERS OR THEIR LANDS FOR THE SPECIAL ASSESSMENT TAXES LEVIED AND CLAIMED AGAINST SAID AWARDS?

The petitioners contend that there was a complete failure of consideration and the following are some of the authorities relied upon to support that contention, *District of Columbia* v. *Thompson*, 281 U. S. 25, 74 L. Ed. 677; *O'Brien* v. *Wheelock*, 184 U. S. 450, 491-492; *Gray's Limitation of Taxing Power*, Section 1999-b, p. 1022; *II Page and Jones, Taxation by Assessment*, p. 1596, notes 1 and 2; p. 2142, Section 1490, Notes 1 and 2; *Mayor, etc., of Baltimore* v. *Hettleman*, 37 Atl. 2d 335, 6th and 8th headnotes; *Huey* v. *Board of Drainage Commissioners*, (Ky.) 15 S. W. 2d 451; *Whitcher* v. *Bonneville Irrigation District*, (Utah) 256 Pac. 785, 4th headnote; *Smith* v. *Enterprise District*, (Oregon) 85 Pac. 2d. 1021, 2nd, 4th, 6th and 7th headnotes. Petitioners further contend that such a taking, without consideration, was not only an "unjust enrichment" but a tak-

ing without due process of law contrary to the Fourteenth Amendment, *Missouri Pacific R. Co.* v. *Nebraska, ex rel. Board of Transportation,* 164 U. S. 403, 417, 41 L. Ed. 489, 495; *Cooley's Constitutional Limitations,* 8th Ed., pp. 1081-1082; *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478, 60 L. Ed. 392. The Motion to Strike filed by the drainage district admitted all that petitioners' Answers alleged on the subject of abandonment and the failure and inability of the drainage district to make any drainage improvements that did or could have benefited petitioners property or be any consideration for the special assessments imposed. Nevertheless the District Court struck out all of said Answers and held the same for naught. The Court of Appeals affirmed that Order.

V

IF THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS HAD AN INDEPENDENT POWER TO APPLY WHAT WAS "JUST AND EQUITABLE" AND APPLY THE PROTECTION AFFORDED BY THE FOURTEENTH AMENDMENT, IRRESPECTIVE OF WHAT THE SUPREME COURT OF FLORIDA SAID OR DID NOT SAY ON THOSE SUBJECTS IN THE MACCLENNY TURPENTINE COMPANY CASE, THEN WAS IT "JUST AND EQUITABLE" OR CONSISTENT WITH THE FOURTEENTH AMENDMENT FOR THE DRAINAGE DISTRICT, ON BECOMING INSOLVENT, TO WHOLLY ABANDON ABOUT TWENTY-FIVE PER CENT OF THE WHOLE AREA OF THE DISTRICT AND MAKE RADICAL CHANGES IN ITS PLAN OF RECLAMATION FOR THE REMAINING AREAS OF THE DISTRICT, ALL WITHOUT THE STATUTORY NOTICES AND HEARINGS PROVIDED FOR BY WHAT ARE NOW SECTIONS 298.07 AND 298.27 FLORIDA STATUTES 1941, AND WITHOUT OTHER COMPLIANCE WITH SAID STATUTES OR DUE PROCESS REQUIREMENTS, AND STILL USE THE ORIGINAL REPORT OF SPECIAL BENEFITS REPORTED IN AUGUST 1916 AND CONFIRMED IN OCTOBER 1916, AS A BASIS FOR LEVYING INSTALLMENT AND MAINTENANCE TAXES ON THE LANDS OF PETITIONERS AND OTHERS SIMILARLY SITUATED?

Petitioners contend that such taxation is neither "just and equitable" nor consistent with due process of law. Some of the authorities relied upon are as follows: *I Page*

and Jones, Taxation by Assessment, p. 200, note 4; *II Page and Jones, Taxation by Assessment*, p. 1141, notes 2, 3, and 4, and p. 1405, note 3. After the extensive abandonments and changes were made new notices and new hearings as to benefits were their absolute right under the statutes cited in the last question and under the Fourteenth Amendment. See cases cited in the notes of *Cooley's Constitutional Limitations*, 8th Edition, p. 1065; *Londoner* v. *Denver*, 210 U. S. 373, 385-386, 52 L. Ed. 1103, 1112. Additional authorities all holding that after such extensive abandonments and changes there could be no valid tax levies without new notices, new hearings, new assessment of benefits and new confirmation thereof are as follows: *McCreight* v. *Central Drainage Dist.*, (Miss.) 102 So. 276; *Armistead* v. *Southworth*, (Miss.) 104 So. 94, 1st and 2nd headnotes and supporting text; *Thomas* v. *Dallas County Levee Imp. Dist.* (Tex.) 23 S. W. 2d, 325, 3rd headnote and supporting text; *Kelleher* v. *Joint Drainage Dist.*, (Iowa) 249 N. W. 401; 28 C. J. S. 342, notes 30, 31 and 32; 28 C. J. S. 378-9, notes 68 and 75; 28 C. J. S. 458, note 78; *State* v. *Missouri Valley Drainage Dist.*, 185 S. W. 2d 800, 8th headnote, decided by the Supreme Court of Missouri March 5, 1945. The District Court struck out all the Answers of the petitioners thus closing the door to any hearing in Court. The Court of Appeals affirmed.

All the facts summarized in the fifth question above stated were admitted by the attacking Motions of the district. Thus the petitioners have never had any day in court on those questions either as required by the State Statutes or as required by the Fourteenth Amendment.

VI

IF THE DISTRICT COURT AND THE COURT OF APPEALS HAD INDEPENDENT JURISDICTION TO DETERMINE WHAT WAS "JUST AND EQUITABLE" AND WHAT WAS CONSISTENT WITH THE FOURTEENTH AMENDMENT, THEN WAS IT "JUST AND EQUITABLE" OR DUE PROCESS OF LAW TO STRIKE ALL OF THE ANSWERS OF PETITIONERS AND GIVE ALL OF THE AWARDS TO THE DRAINAGE DISTRICT WHEN AT LEAST ONE-SIXTH OF ALL THE TAXES CLAIMED BY THE DISTRICT WERE FOR PRETENDED MAINTENANCE TAXES LEVIED AFTER THE DRAINAGE DISTRICT BECAME INSOLVENT AND WHEN THERE WAS NEVER ANY MAINTENANCE ANYWHERE IN THE DISTRICT AND WHEN THERE WAS NOT EVEN ANY ORIGINAL CONSTRUCTION IN ABOUT TWENTY-FIVE PER CENT OF THE AREA OF THE DISTRICT INCLUDING THE PARTS WHERE PETITIONERS' LANDS WERE SITUATED?

All of the facts summarized in this question were clearly stated in the Answers of the petitioners and admitted by the attacking Motions of the drainage district. There never was any shadow of consideration for the pretended maintenance taxes included in the claims of the district as set forth in "Exhibit A" to its Answer (Vol. I, pp. 64 to 72). The Answers of petitioners further show that such maintenance taxes as were collected during the ten year period of the Federal Receivership from 1924 to 1934 were diverted by the Supervisors and Receiver to the payment of attorney's fees, receiver's fees, and costs in the Federal Foreclosure suits resulting in the decrees involved in the first appeal presented in this case.

If petitioners had paid such maintenance taxes as have been claimed against their lands the drainage district would have been "unjustly enriched". The mere passing of time or inaction by the petitioners in making attacks upon such maintenance taxes could not destroy their right to show a want of consideration or a failure of consideration for such taxes. *District of Columbia* v. *Thompson*, 281 U. S. 25, 74 L. Ed. 677; *Stockman* v. *City of Trenton*, 132 Fla. 406, 181

So. 383; *Smith* v. *City of Winter Haven,* 18 So. 2d, 4; *O'Brien* v. *Wheelock,* 184 U. S. 450, 491-492; *Gray's Limitations of Taxing Power,* Section 1999-b.

VII

IF WHEN DETERMINING RIGHTS BETWEEN ADVERSE CLAIMANTS UNDER THE LAST CLAUSE OF 40 U. S. C. A., SECTION 258 (A), FEDERAL COURTS MUST IN DISPOSING OF FEDERAL QUESTIONS AND NON-FEDERAL QUESTIONS BE BOUND BY STATE COURT DECISIONS, THEN MUST THE FEDERAL COURTS ABIDE BY A STATE COURT DECISION AS RES JUDICATA SIMPLY BECAUSE IT RELATES TO LANDS IN THE SAME TAXING DISTRICT EVEN THOUGH THE STATE CASE WAS UPON DIFFERENT ISSUES BETWEEN DIFFERENT PARTIES AND RELATED TO DIFFERENT LANDS, OR MAY SUCH FEDERAL COURTS IN TRYING TO ARRIVE AT WHAT THE STATE LAW IS, CONSIDER CONFLICTING STATE DECISIONS RENDERED BOTH BEFORE AND AFTER THE ONE DEALING WITH LANDS IN THE SAME TAXING DISTRICT AND IN CASE OF SUCH CONFLICT IS IT THE DUTY OF THE FEDERAL COURTS TO EXERCISE AN INDEPENDENT JUDGMENT ON MATTERS OF STATE LAW?

The petitioners by their Motion for trial on adverse claims (Vol. II, pp. 6 to 12) urged upon the District Court that the decision of the Florida Supreme Court in *Baldwin Drainage District* v. *Macclenny Turpentine Company,* 18 So. 2d, 792, was not controlling for sundry reasons and that the District Court should exercise its own independent judgment in disposing of the issues tendered by the Answers of petitioners then on file. The same Motion, by Section 9, also pointed out that since the decision in the *Macclenny Turpentine Company* case the Supreme Court of Florida had in *Smith* v. *City of Winter Haven,* 18 So. 2d 4, rendered a decision wholly inconsistent with the doctrine of acquiescence as set forth in the *Macclenny Turpentine Company* case, 18 So. 2d text 796. The Amended Answers of the petitioners filed in this and three other cases (Vol. II, pp. 33 to 45) were intended and especially designed to sufficiently invoke the protection of the Fourteenth Amendment and thereby meet alleged deficiencies in the

Bill which was before the Florida Supreme Court in the *Macclenny Turpentine Company* case. Nevertheless the District Court and the Court of Appeals treated the decision of the Supreme Court of Florida in the *Macclenny Turpentine Company* case substantially as *Res Judicata* and for that reason held for naught and struck out all the Answers of the petitioners, both the original Answer and the Amended Answer, and thereupon disbursed all of the awards of the juries to the drainage district. By supporting brief we shall point out in more detail some of the essential differences between the *Macclenny Turpentine Company* case and the case as made by the conflicting Answers of petitioners and drainage district in the case at bar. Briefly those differences are:

1. In the *Macclenny Turpentine Company* case that company and others were the actors by bill to cancel taxes. Here the adverse claimants are on each side both Plaintiff and Defendant.

2. There was no such non-resident original property owner involved in the *State* case as P. F. McDermott and his heirs whose status is described (Vol. I, pp. 86-87) of the case before the Court.

3. The parties, subject matter and causes of action were not the same.

4. The Supreme Court of Florida by-passed the real defenses or the real bases of attack made in the Bill of Complaint and undertook to dispose of the case on the basis of alleged acquiescence and estoppel which had neither been pleaded or proved by the drainage district.

We shall also, by supporting brief, present inconsistent decisions of the Florida Supreme Court rendered both prior and subsequent to the decision in the *Macclenny Turpentine Company* case. For instance: *Hughey* v. *Winter Haven,* 44

Fla. 601, 33 So. 249, decided in October, 1902, and in *Smith* v. *City of Winter Haven,* 18 So. 2d 4, decided May 9th, 1944, and in *State* v. *Town of Boynton Beach,* 129 Fla. 528, 177 So. 327, decided in July, 1937. Two before and one after the *Macclenny Turpentine Company* case in which the Supreme Court of Florida held that a standing by or acquiescence or even the payment of taxes upon properties illegally assessed or as to which no benefits were received, did not bar any defense by the property owner, but instead payment of taxes during such periods constituted "unjust enrichment". On the question of laches the decisions of the Supreme Court of Florida are equally inconsistent. See *Tampa Waterworks* v. *Woods,* 104 Fla. 306, 139 So. 800, decided in February, 1932, 3rd headnote, and in *State* v. *Town of Boca Raton,* 129 Fla. 673, 177 So. 293, 2nd headnote, and in *Smith* v. *City of Winter Haven,* 18 So. 2d 4, 6th headnote. In two decided before and one after the *Macclenny Turpentine Company* case the Florida Supreme Court held that a contention of laches is not available to a city or other party who has suffered no injury or change of position or who has been unjustly enriched. A similar subsequent decision is *Richmond* v. *Town of Largo,* 19 So. 2d 791. In this uncertain state of what the Florida Supreme Court will next decide as to the doctrine of acquiescence it became the duty of the District Court in this case to exercise an independent judgment and decide the adverse claims on their merits, even if there had been no Federal questions presented, *Meredith* v. *City of Winter Haven,* 320 U. S. 228, 88 L. Ed. 9.

The drainage district has now instituted a new suit, on its own account, to foreclose alleged drainage taxes on all that part of the drainage district situate in Nassau County constituting a One-Sixth (⅙th) of the whole area which lies in the northwest corner of the district. In that late foreclosure suit the property owners will point out such con-

flicting decisions of the Supreme Court of Florida and will also invoke the protection afforded by Section 29, Article 16, of the State Constitution which reads, in part, as follows:

> "No private property * * * shall be appropriated to the use of any corporation or individual until full compensation shall be first made to the owner."

The Supreme Court of Florida has repeatedly sustained the protection afforded by this Section of the Constitution in cases where there had been an arbitrary extension of municipal boundaries which resulted in taxation without municipal benefits, *State* v. *City of Stuart,* 97 Fla. 69, 120 So. 325; *State* v. *City of Avon Park,* 108 Fla. 641, 149 So. 408, 8th, 9th, 10th, 13th and 14th headnotes. In the case of *Hillsborough County* v. *Kensett,* 107 Fla. 237, 144 So. 393, the Court held that under the above quoted section of the State Constitution properly unlawfully taken without compensation could not become public property until paid for and the Court held substantially the same in the case of *Spafford* v. *Brevard County,* 92 Fla. 617, 110 So. 451. In *I Page and Jones on Taxation by Assessment,* Section 109, similar provisions from various State Constitutions are quoted. In Section 111, pages 183, 184 of the same volume, the authors point out that the,

> "Constitutional rule as to just compensation held to apply to assessments."

Many cases sustaining the text are cited in footnotes including *Norwood* v. *Baker,* 172 U. S. 269.

So in the case at bar, as also in the new case instituted to foreclose taxes, the taking of the lands by the drainage district has not been completed. Even if the attempted taking is for a public use the property owners in this case and in the new case, lately instituted, were and are entitled to be heard on the question of whether their properties are

being appropriated, either for a public use or a private use, without just compensation having previously been paid or the equivalent in benefits bestowed. The Supreme Court of Florida will ultimately have to decide this question in the new case because it was not presented or argued in the *Macclenny Turpentine Company* case.

In *Hamilton's Law of Special Assessments,* Section 795, it is said:

> "Where the assessing board lay a special assessment upon property regardless of the principle of benefits, *or materially in excess of the present benefits actually received,* it is a case of taking private property for public use without just compensation, and a proper case for the exercise of the equity jurisdiction." (Italics ours.)

This text is supported by many cases cited in Note 54.

In *II Page and Jones Taxation by Assessment,* p. 1147, it is said:

> "To whatever constitutional restriction or upon whatever theory it may be explained, the great weight of authority is that the legislature has no power to authorize assessments in substantial excess of the special benefits conferred upon the realty assessed by the improvement for which the assessment is levied. If the assessment is in substantial excess of the benefits conferred, it is invalid as a violation of the constitution."

This text is supported by many cases cited in Note 4.

The case of *Stockman* v. *City of Trenton,* 132 Fla. 406, 181 So. 383, 2nd headnote, is in harmony.

The petitioners contend that for the several reasons above noted the decision of the Supreme Court of Florida was not a complete bar against the petitioners with respect to the several matters urged by them in their amended answers. That this is especially so as applied to the Federal questions

invoked by petitioners' Answers which had not been properly presented to the State Supreme Court and were not in any sense determined by that Court. If the lower Courts are at liberty to apply well settled rules of laches and estoppel established by Federal courts then the ruling handed down in *O'Brien* v. *Wheelock,* 184 So. 450, will apply because in the instant case there are many similar facts. J. W. Harrell, attorney of record, claims to own about ninety-five per cent (95%) of the bonds of the drainage district, but he bought in the open market beginning in 1937 at prices from five cents (5¢) to ten cents (10¢) on the dollar and not from the drainage district as an original purchaser. That was the situation in the *O'Brien* case, the original bondholders took their losses—not the present bondholders. Again, as in the *O'Brien* case, the property owners did not get what they bargained for or what was promised in consideration of benefits assessed and the taxes levied. These distinctions are well pointed out in *Gray's Limitations of Taxing Power,* Section 1999-b, p. 1022, and cases cited in the notes. In contrast the property owners involved in *Shepard* v. *Barron,* 194 U. S. 553, and in *Utley* v. *St. Petersburg,* 292 U. S. 106, reaped the benefits—received all the benefits contemplated at the out-set and in addition the property owners in the *Shepard* case actually promoted the project. No such facts were pleaded or proven in the case at bar. The district was itself in default of performing its own undertakings for a period of about 25 years before the takings in this case occurred. The district was also insolvent and unable to perform for at least 20 years prior to the takings in this case. Therefore the district was never at any time in position to complain of any laches or take advantage of any apparent acquiescence on the part of property owners. It had never been prejudiced by any change of position on account of anything done or omitted by the property owners, *Ashwander* v. *Tennessee Valley Authority,* 297 U. S.

288, 80 L. Ed. 688, 5th headnote; *Pence* v. *Langdon*, 99 U. S. 578, 25 L. Ed. 420, 4th and 5th headnotes; *Ketchum* v. *Duncan*, 96 U. S. 659, 24 L. Ed. 868, 4th headnote.

Reasons Relied upon for Allowance of the Writ of Certiorari

A. IT IS A MATTER OF GREAT PUBLIC IMPORTANCE THAT THERE BE AN AUTHORITATIVE DECISION DEFINING THE JURISDICTION AND POWER OF LOWER FEDERAL COURTS IN THE ADMINISTRATION OF THE LAST CLAUSE OF 40 U. S. C. A., SECTION 258 (A), AND THE DECISIONS AND JUDGMENTS OF THE LOWER COURTS, IN THIS CAUSE, ARE APPARENTLY IN CONFLICT WITH THE DECISIONS OF THIS COURT IN *U. S.* v. *MILLER*, 317 U. S. 369, 382, 87 L. ED. 336, 347.

In the *Miller* case this Court defined the rule for determining the compensation to be paid to owners in condemnation suits such as the one at bar. Near the end of the opinion the Court observed,

> "The situation is like that in which litigants deposit money as security or to await the outcome of litigation. Notwithstanding the fact that the court released the fund to the respondents, the parties were still before it and it did not lose control of the fund but retained jurisdiction to deal with its retention or repayment *as justice might require.*" (Italics ours.)

We believe that the phrase "as justice might require" is equal to the phrase "just and equitable" found in the last clause of 40 U. S. C. A., Section 258 (a). If so it is a matter of Federal law and not of State law as to what is "just and equitable" in such cases. The 10th headnote (L.Ed) also supports this conclusion. The opinions and judgments below are apparently in conflict with that view.

B. THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW ARE APPARENTLY IN CONFLICT WITH DECISIONS OF THIS COURT CONSTRUING AND APPLYING OTHER FEDERAL STATUTES WHICH CONTAIN CLAUSES ANALOGOUS TO THE LAST CLAUSE OF 40 U. S. C. A., SECTION 258 (A).

In *American Surety Co.* v. *Bethlehem Nat. Bank*, 314 U. S. 314, 86 L. Ed. 241, this Court construed and applied

the clause of the National Bank Act directing a "just and equal distribution" of an insolvent bank's assets. This was held to create rights under Federal law not controlled by State decisions. Another case under the National Bank Act was *D'Oench, D. & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447, 86 L. Ed. 956, where like conclusions were stated and where certiorari was granted because the decision of the lower Courts were asserted to be in conflict with a prior decision of the Court. A like decision was reached in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 87 L. Ed. 838. See 1st and 2nd headnotes and supporting text. Certiorari was granted because of the importance of the questions raised and because of the conflict between the decision below and the decision of another Circuit Court of Appeals.

In *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 86 L. Ed. 1293, the Court considered a clause of the Bankruptcy Act which required that any plan of reorganization must be one which,

> "Is fair and equitable and does not discriminate unfairly in the case of any class of creditors."

Here again the doctrine of *Erie R. Co.* v. *Tompkins* was held not to apply. In the opinion, 316 U. S. 95, the Court held:

> "In the interpretation and application of federal statutes, federal not local law applies."

The Court granted certiorari because of the importance in bankruptcy of the questions raised.

C. THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW ARE IN CONFLICT WITH THE DECISION OF THE SECOND COURT OF APPEALS IN THE CASE OF *U. S.* v. *CERTAIN LANDS IN THE BOROUGH OF BROOKLYN*, 129 FED. 2D, 577.

In the case above cited from the Second Circuit Court of Appeals the Court construed and applied 40 U. S. C. A., Section 258 (a), and specifically held as in the 4th headnote:

> "The Circuit Court of Appeals was not bound to follow local law in construing provisions of the Declaration of Taking Act providing, in effect, that distribution of award in respect to encumbrances on condemned land shall be just and equitable. 40 U. S. C. A., Section 258 (a)."

In the opinion supporting the 4th headnote the Court cited *American Surety Co.* v. *Bethlehem Nat. Bank*, —— *supra*, which, as above noted, construed an analogous phrase of the National Bank Act. If the conclusion reached by the Second Circuit Court was correct then undoubtedly the conclusion reached by the Fifth Circuit Court in the case at bar was wrong. Such conflict between decisions of circuit courts of appeal is a familiar reason for granting certiorari. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, —— *supra.*

D. THE OPINION AND JUDGMENT OF THE FIFTH CIRCUIT COURT OF APPEALS IS ALSO APPARENTLY IN CONFLICT WITH THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN THE CASE OF *PURCELL* v. *SUMMERS*, 145 FED. 2D 979.

In the *Purcell* case the Court, speaking through Circuit Judge Parker, held that even in a diversity of citizenship case the findings of fact made by the Supreme Court of the State, based on pleadings and evidence before such state court would not be regarded as *res judicata* under the doctrine of *Erie R. Co.* v. *Tompkins*, and that a Federal court was not required to adopt the same findings of fact even if evidence had been taken in both cases and the

evidence was the same. In the case at bar the record shows that no evidence was taken in the state court case of Maclenny Turpentine Company and no evidence was taken in the courts below. Hence there is here much more reason why the rule announced by the Fourth Circuit Court of Appeals should prevail.

E. THE FIFTH CIRCUIT COURT OF APPEALS, BY ITS OPINION FILED IN THIS CAUSE, AS WE BELIEVE, MISAPPLIED THE DECISIONS OF THIS COURT IN *SHEPARD* v. *BARRON*, 194 U. S. 553, 48 L. ED. 1115, AND *UTLEY* v. *CITY OF ST. PETERSBURG*, 292 U. S. 106.

As previously noted in this petition the primary basis announced by the Court of Appeals for its opinion was that the Supreme Court of Florida had in the Maclenny Turpentine Company case charted the course which Court of Appeals had to follow. Nevertheless in the latter part of the opinion the Court of Appeals apparently endeavored to strengthen its position by citing the case of *Shepard* v. *Barron*, the *Utley* case and like decisions. The headnote of *Shepard* v. *Barron* (L. Ed.) plainly states facts which readily distinguish that case from anything contained in the record at bar. The property owners, there involved, not only petitioned for the improvements under the act in question but participated in carrying out the work and recognized the justice of the assessments from time to time during the progress of the work and in addition signed a statement for the purpose of inducing the issuance of improvement bonds to the effect that the work had been properly done. Thus the property owners burned their bridges behind them and they got what they bargained for. The record at bar is entirely to the contrary, the petitioners here got nothing and in no way participated in promoting the improvement. The district failed initially to make any improvement that could benefit petitioners' lands and thereupon became insolvent and for more than 20 years before

the taking was utterly unable to supply any consideration. The same distinctions will apply to *Utley* v. *St. Petersburg* because in that case the property owners in question stood by and saw their property improved, enjoyed the benefits of the improvement and waited until after the whole matter had been validated by the legislature and then sought to avoid payment of assessments. By accepting and enjoying the benefits—the consideration for which they bargained—they were held estopped to contest payment. It must be remembered also that in the case at bar the Answers of the petitioners set up an entirely different case and all the facts they pleaded were admitted by the attacking motions of the district. The result is that the doctrine of estoppel explained by this Court in *O'Brien* v. *Wheelock*, 184 U. S. 450, 491, 492, should apply, as also other cases cited in the notes of *Gray's Limitation of Taxing Power*, Section 1999-b, p. 1022. See also 48 Am. Jur., Subject "Special or Local Assessments," Section 296, p. 783 and cases cited in notes 7 to 17. Also *II Page and Jones* on *Taxation by Assessment*, Section 1028 and cases cited in notes 1, 7 and 12, also Section 1038 same volume.

Application for Consideration of Prior Record Without Printing

The petitioners by their undersigned counsel hereby make application to the Court to permit the original transcript, filed in this Court in the case of *Bostwick* v. *Baldwin Drainage District* and docketed at the October Term 1942 as case number 853, to be used and considered as a part of the transcript of record in connection with this Petition for Certiorari without reprinting said former transcript as a part of the record in this cause. Petitioners further say that on inquiry of the Clerk of this Court they were advised that his supply of copies of said former record had been exhausted, but that he does have the original

copy of said former record on file. The petitioners are also forwarding, with this petition, an additional copy of said former record duly certified by the Clerk of the Fifth Circuit Court of Appeals and they respectfully request that said additional certified copy be accepted for use in connection with this petition without reprinting the same, pending a decision of whether or not Writ of Certiorari will be granted or denied. Petitioners further say that the transcript of record made in said cause and filed with said Circuit Court of Appeals as case number 11347 plus additional proceedings in that Court has been duly certified by the Clerk of said Court and the requisite number of copies thereof will be filed in connection with this petition. Petitioners further say that copy of said original transcript, docketed in this Court as case number 853, at the October Term 1942, is now in the hands of Hon. Giles J. Patterson, attorney of record for the Respondents and a copy of same is in the hands of the undersigned counsel.

Wherefore your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth District commanding that court to certify and send to this Court for its review and determination on a day certain to be named therein the full and complete transcript of record and all proceedings in the case numbered on its docket No. 11347 and entitled *Nellie C. Bostwick, et al.*, v. *Baldwin Drainage District, et al.*, and that the decree of said United States Circuit Court of Appeals in said cause be reversed by this Court and that petitioners have such other and further relief in the premises as to this Court may seem just.

THOS. B. ADAMS,
Counsel for Petitioners.